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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 517

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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Note: All emphasis in this petition for rehearing is supplied.

To the Honorable Chief Justice and the Justices of the Supreme Court of the United States:

The petitioner respectfully presents its petition for rehearing of its petition for certiorari.

The Subject Presented by This Petition for Rehearing.

The final summary judgment of the district court is not authorized by Rule 56 upon which it was based.

That the final judgment was wholly based on Rule 56 as a summary judgment and not on any other ground or procedure is made clear by the opinion of the district court as follows:

> "The ruling here is not made on the case upon final submission on the law and facts. The ruling here is on the defendant's motion for summary judgment. Rule 56." R. 286, folio 300, second paragraph, second sentence. "I repeat that it should be borne in mind that the ruling of the Court here is on the motion for a summary judgment under Rule 56 and not upon a final submission at a final hearing on the law and facts as contemplated by Rule 52." R. 287, at top of page.

The appellate court based its affirmance upon exactly the same Rule 56:

> "Appellant is here insisting that under the state of the record, the court was without jurisdiction to enter a summary judgment dismissing appellant's petition on the above ground." R. 340, first full paragraph.

The Issue.

The case below, in both courts, turned upon a single question. That question was whether pursuant to Rule 56 of the Rules of Civil Procedure a summary final judgment could lawfully be rendered without a trial of the case. By the terms of the rule the determination of that question depended upon whether there existed a "**genuine issue as to any material fact,**" and whether the respondent was "entitled to a judgment as a matter of law".

Also by the terms of the rule the existence of such an issue had to be determined from the "pleadings, depositions and admissions on file, together with the affidavits" and from no other source. No testimony was or could be tendered at any hearing or trial.

The petitioner sued for ejectment with damages. The respondent answered and moved for summary judgment submitting various affidavits. The petitioner submitted counter affidavits. Thereupon the district court entered its judgment at R. 285, folio 299, which incorporated by reference the grounds for the judgment set forth in its Findings of Fact and Conclusions of Law found at R. 280 to 285. The Conclusions of Law on which the judgment was based were that the petitioner was precluded from a recovery (1) by the judgment of forfeiture in the state Pike Circuit Court in *Eastern* v. *Commonwealth*, 217 Ky. 667, affirmed in 219 U. S. 140, and (2) by the adverse possession of the respondent and its grantors or lessors.

The applicable provisions of Rule 56 read thus:

"Rule 56. Summary Judgment.

. . .

(b) For Defending Party. A party against whom a claim . . . is asserted . . . may . . . move with or without supporting affidavits for a summary judgment.

. . .

(c) . . . The adverse party prior to the day of hearing may serve opposing affidavits. **The judgment sought shall be rendered forthwith if** the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, **there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.**

. . .

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

The Importance of a True Observance of Rule 56.

The importance of a proper observance of Rule 56 can scarcely be overemphasized. If its provisions be too broadly interpreted, or if they be disregarded, not only are the parties deprived of a jury trial in a case where they did not waive a jury and did not consent to submission of the issues to the court, but, what is more serious, the nature of the rule is such that if unduly extended it substitutes an essentially summary hearing for a plenary trial.

This case is a good illustration of the impossibility of fully and completely considering all of the true evidence of the parties. Had the affiants who made the many affidavits been subjected to examination on a trial much of what appears therein would have dissipated under its own power or lack of it. For example see the signature of Hylton to his affidavit in respondent's Exhibit No. 14, at the top of R. 159. He has "seen Exhibit A as filed with the defendant's Answer". On the witness stand, if he would ever have appeared there, the court no doubt would on its own motion have rejected him as a witness because his statements, as made in his affidavit, would be worthless.

So with the entire set of twenty "Affidavits as to Possession" submitted by the respondent at R. 140 to 218; they present ultimate facts and after the chaff would be disbursed by cross examination the primary evidence that remained would differ greatly from what is here presented.

The recognized and useful procedure embodied in Rule 56 serves its purpose when the parties are agreed on the essential facts so there remains, in the words of the Rule, **"no genuine issue as to any material fact"**. That is, if the parties are agreed on the facts and desire a declaration of the substantive law on the legal question submitted, they may have it forthwith. But where the parties disagree on the facts Rule 56 has no function.

It is desired now to present an examination of the record in relation to the situation as it existed in the district court on the motion for summary judgment which the court granted on two grounds: (1) that the forfeiture action and (2) adverse possession by the respondent precluded any recovery by the petitioner.

It is submitted that neither of these grounds shut the petitioner out from any recovery but on the other hand the door remains wide open. Many issues of fact still separate the parties.

1.

The Forfeiture Suit Examined.

A careful examination of the effect of the forfeiture suit is essential to a proper consideration of this petition for rehearing because the opinion of the appellate court ends as follows:

> "It is apparent, therefore, that the judgment in question forfeited all of the lands described in the Haskell grant, and by reason thereof appellant has no interest in them. *Oklahoma* v. *Texas*, 273 U. S. 21, 42; *Decker* v. *Tyree*, 204 Ky. 302. The conclusion here reached renders unnecessary consideration of all other issues raised by the parties."
>
> Judgment affirmed." R. 362, top of page.

As will be clearly shown under the heading "The Lands Affected by the Forfeiture Judgment Were Limited to Pike County" a little further on, it is true that all of the Haskell grant was described but **the forfeited lands were but a part of it, namely that part located in Pike County.** This form of description of real estate is quite commonly employed in deeds and mortgages and is in every day use. For example: "All that part lying in the northwest quarter of Section 18 of the following described tract:" followed by a detailed description of a larger tract of which only the part is being conveyed.

Its Geographical Extent.

The Judgment Was Based on the Wrong Case.

In the first place, the district court cited the wrong Kentucky case when it based its summary judgment on the assumed forfeiture of the petitioner's 300,000 acres. It cited the case as "127 Ky. 667, affirmed by the United States Supreme Court, 219 U. S. 140, in which the lands involved here, and the Haskell Grant under which plaintiff claims, were forfeited". That 127 Kentucky case was not a forfeiture case and concerned "tracts of land", claimed under "patents" which are not identified either in 219 U. S. 140, or in the present record. That case was a petition brought by the owner for **assessment** of real estate and not a suit brought by the state. In 219 U. S. 140 the opinion of this court identified it as **Case No. 47** in this court and as 127 Ky. 667 in the state court and described the nature of the original action and named the parties plaintiff and defendant. The Haskell grant was not involved in it.

The Forfeiture Case.

It is another Kentucky case which is involved here and it also is identified by the opinion of this court in 219 U. S. 140, immediately following its reference to the assessment case, as **Case No. 48,** in this court. The opinion says that Case No. 48 was not officially reported in the state reports but is found in 33 Ky. L. Rep. 857. It is described as a forfeiture suit brought by the state which resulted in a judgment "forfeiting the title . . . to lands held in **Pike County**". There can be no doubt on this point. See the record in this pending petition for certiorari at R. 29 to 130 where the present respondent put in as its "Defendant's Exhibit 1" the Transcript of Record in the **Case "No. 48"** as certified by the clerk of this court. (Although the clerk's certificates appear at R. 125 and 126, yet R. 127 to 130 is a part of it, by express references at R. 33 and R. 116 under "*judgment*".) This "Defendant's Exhibit 1" is the transcript of the record in the forfeiture case in the Kentucky Pike Circuit Court and in the Kentucky Court of Appeals which came into this court as Case No. 48 on writ of error. The state records were shown in this indirect manner because the originals were reported to be lost.

The Haskell grant of 300,000 acres which is involved in this present petition for certiorari is identified as being the grant **containing,** among other lands, the Pike County lands which were the sole subject of the forfeiture "Case No. 48" (33 Ky. L. Rep. 857). See R. 2 and also R. 37, folio 46. This confusion of the old state court cases is very important because both courts below based their "forfeiture" conclusions upon the incorrect assumption that the entire Haskell grant of 300,000 acres was forfeited in the Pike Circuit judgment whereas **only that part of the Haskell grant located in Pike County was affected by it.**

No other portion of the Haskell grant of 300,000 except that portion located in Pike County was covered by the forfeiture judgment in the Pike Circuit Court. We proceed to demonstrate this assertion.

The Lands Affected by the Forfeiture Judgment Were Limited to Pike County.

The judgment of the Kentucky Pike Circuit Court in the forfeiture suit is found in the present record at R. 127 to 129, and incorporated in the state court records as certified to this court in the error "Case No. 48", 219 U. S. 140. See R. 33 and R. 116 under "*Judgment*". Its applicable part reads as follows:

> "ORDERS PIKE CIRCUIT COURT FEB. TERM 14 DAY OF FEB. 1908 . . . *Commonwealth of Kentucky* v. *Eastern Ky. Coal Lands Corporation & C. B. Hillhouse Judgment* . . . It is further ordered and adjudged and decreed that the title and claim of each and all of the Defts and those by, through and under whom they claim to the lands in the petition and hereinafter described by, through and under the patents and survey in the petition and hereinafter described be, and the same is now hereby forfeited and said title and claim thereto is now transferred to, and vested in the Commonwealth.
>
> The patents and survey, title and claim under which it is hereby adjudged to be forfeited and adjudged vested in the Commonwealth and lands therein described are as follows, to-wit:
>
> * * *
>
> [this starred omission is that of the Record at R. 128.]
>
> Tract 21. **All that part that is situated in Pike County Kentucky** west of the top of the ridge that divides the waters of the Levisa Fork from the waters of Tug Fork of Sandy River **of that certain tract or parcel of land containing 300,000 acres** by survey bearing date 28 day of November 1795 **which was granted by the Commonwealth of Virginia to Benjamin Haskell . . .**"

Thus it is very clear that the forfeiture judgment pertained only to **that part** of the Haskell grant which is **situated in Pike County.**

The petition for forfeiture sought forfeiture only of lands located in Pike County. It is found at R. 36 et seq., where, at R. 37, the land is described as **"All that part that is situated in Pike County** . . . of that certain tract or parcel of land containing 300,000 acres . . . granted . . . to Haskell." At R. 38 the land is again described in the petition as **"All that part that is situated in Pike County** . . . of that certain tract or parcel of land, containing 300,000 acres . . . granted . . . to Haskell."

The Pike County Circuit Court was not asked, nor did it attempt, to forfeit lands situated outside of that county.

The Map of the Haskell Grant.

The importance of the erroneous assumption that the forfeiture judgment comprised the entire Haskell grant is shown by an examination of the map of the entire Haskell grant at R. 136 which, as explained later in this paragraph is here inserted with the county lines colored green, and may be opened out for examination. The grant includes lands in Kentucky and Virginia within five counties, four of which lie in Kentucky and contain lands claimed by the respondent and colored yellow on the map. R. 135, last paragraph of Cunningham's affidavit. The grant as a whole is wider at the north and narrows toward the south end. **The boundaries between the counties are very indistinctly marked** in the Exhibit A at R. 136 by alternate long and short black lines. —— — —— — —— —. Because it is difficult to follow these boundary lines a copy of the Haskell grant map at R. 136 has been inserted in this petition for rehearing and on it the county boundaries are distinctly

traced in green. The Pike County boundary separates that county mostly from Floyd and Letcher counties and from a little of Knott County. It runs roughly for most of its length from north to south through the middle of the grant between Pike and Floyd Counties and then about two-thirds of the way south turns eastward between Pike and Letcher Counties.

After the Pike County boundary is traced out it is seen that a minor portion of the Haskell grant lies in that county **and a very small portion of the lands claimed by the respondent are found in Pike County.**

So far as the geographical extent of the forfeiture judgment is concerned in the present ejectment suit between the petitioner and the respondent, only that portion of Pike County lands occupied by the respondent and colored yellow on the R. 136 map is involved. These Pike County lands, according to the "List of Leases" put in by the respondent between R. 12 and 13 at pages 14 to 22 of the list, comprise a total of only 13,869 acres out of 300,000 acres.

The attempt to extend the forfeiture judgment to cover the entire 300,000 acres of the Haskell grant will not survive an examination. That forfeiture judgment affected only lands in Pike County.

Here exists a wide issue of material fact between the parties.

The Proceeding in the Forfeiture Suit Is Not Completed.

As to the lands affected by the judgment of forfeiture the proceeding was but partly completed. The judgment expressly reserved for future adjudication "all other ques-

EXHIBIT "A"
(Part 1)
filed with Affidavit of Geo. A. Cunningham

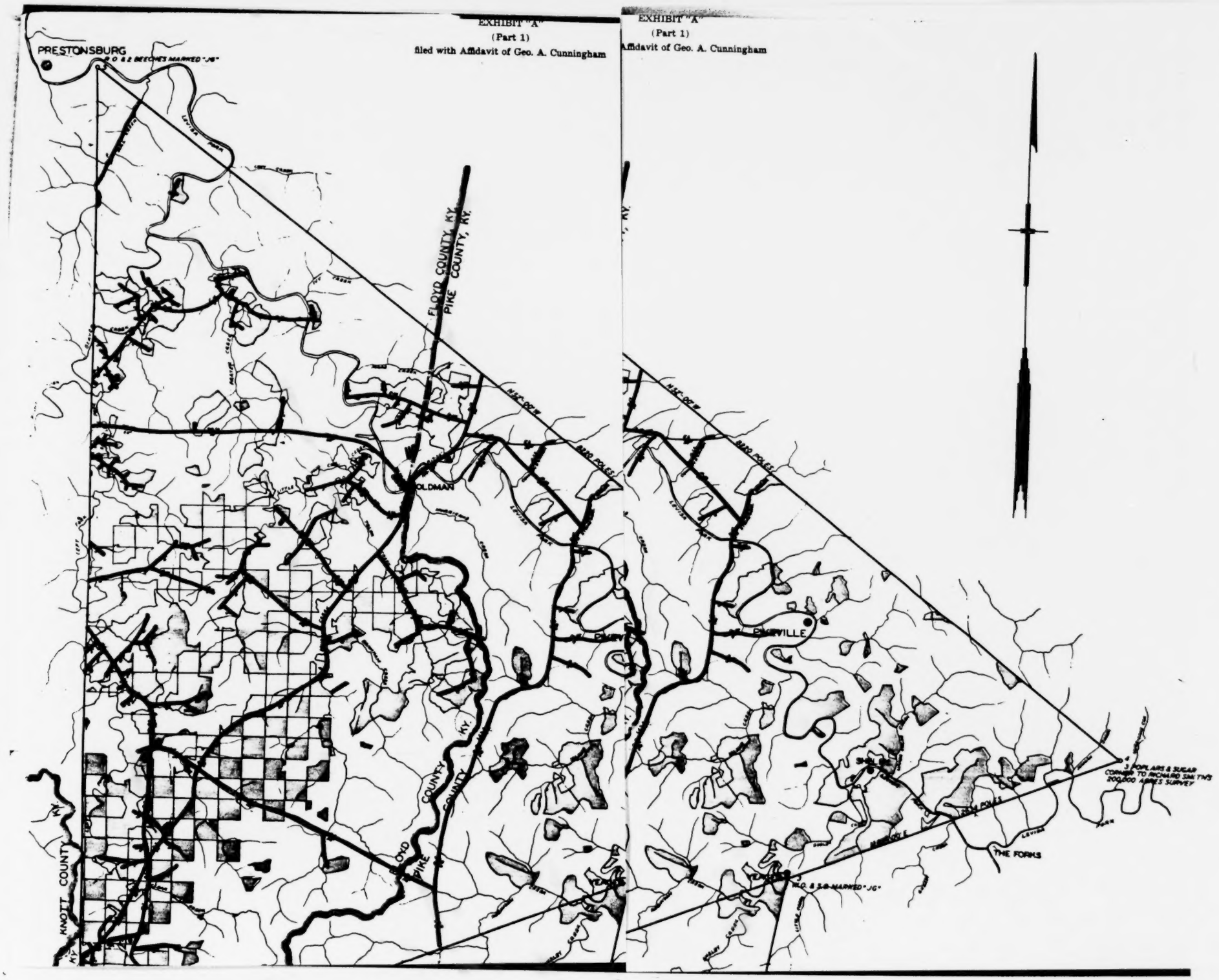
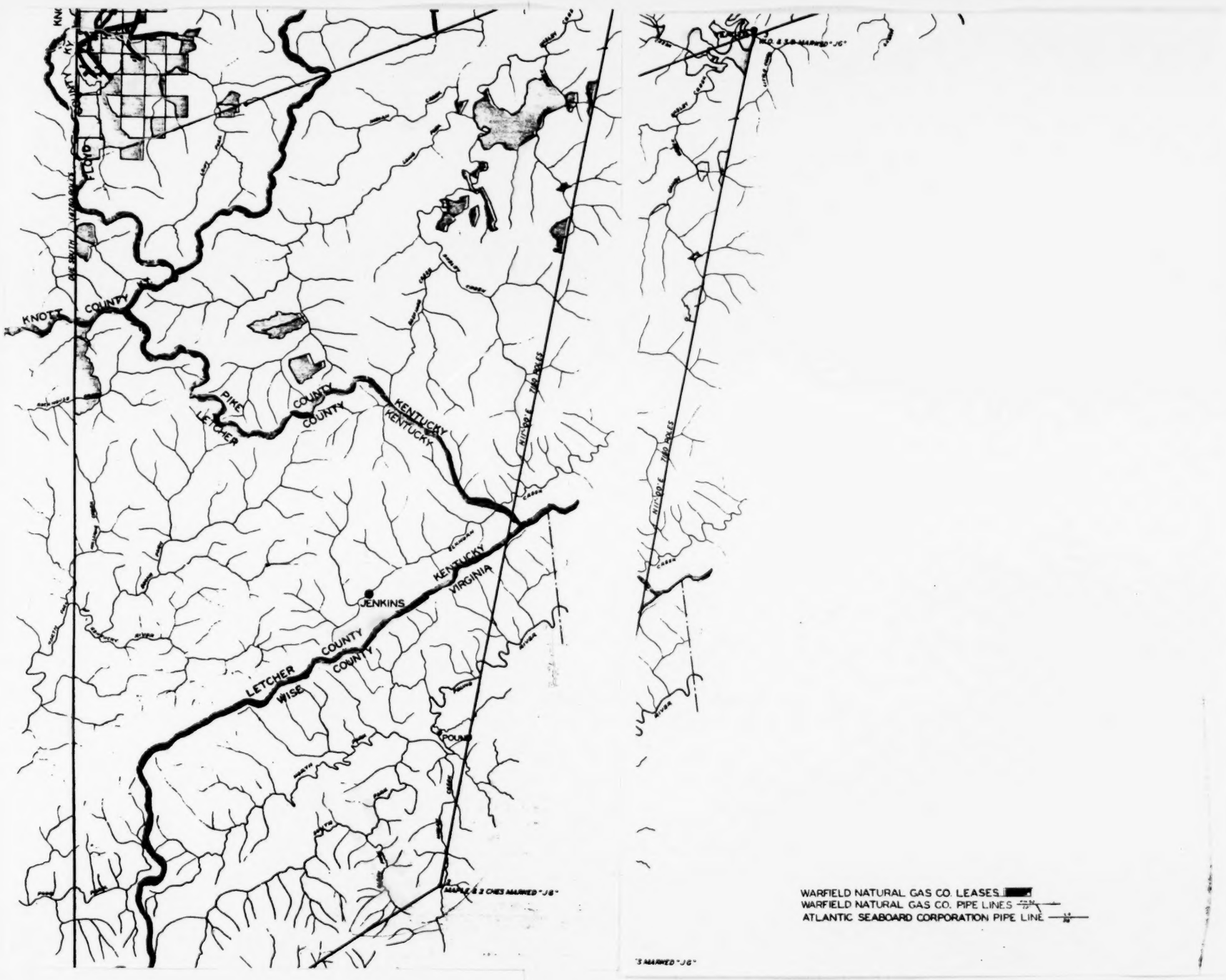


EXHIBIT "A"
(Part 1)
Affidavit of Geo. A. Cunningham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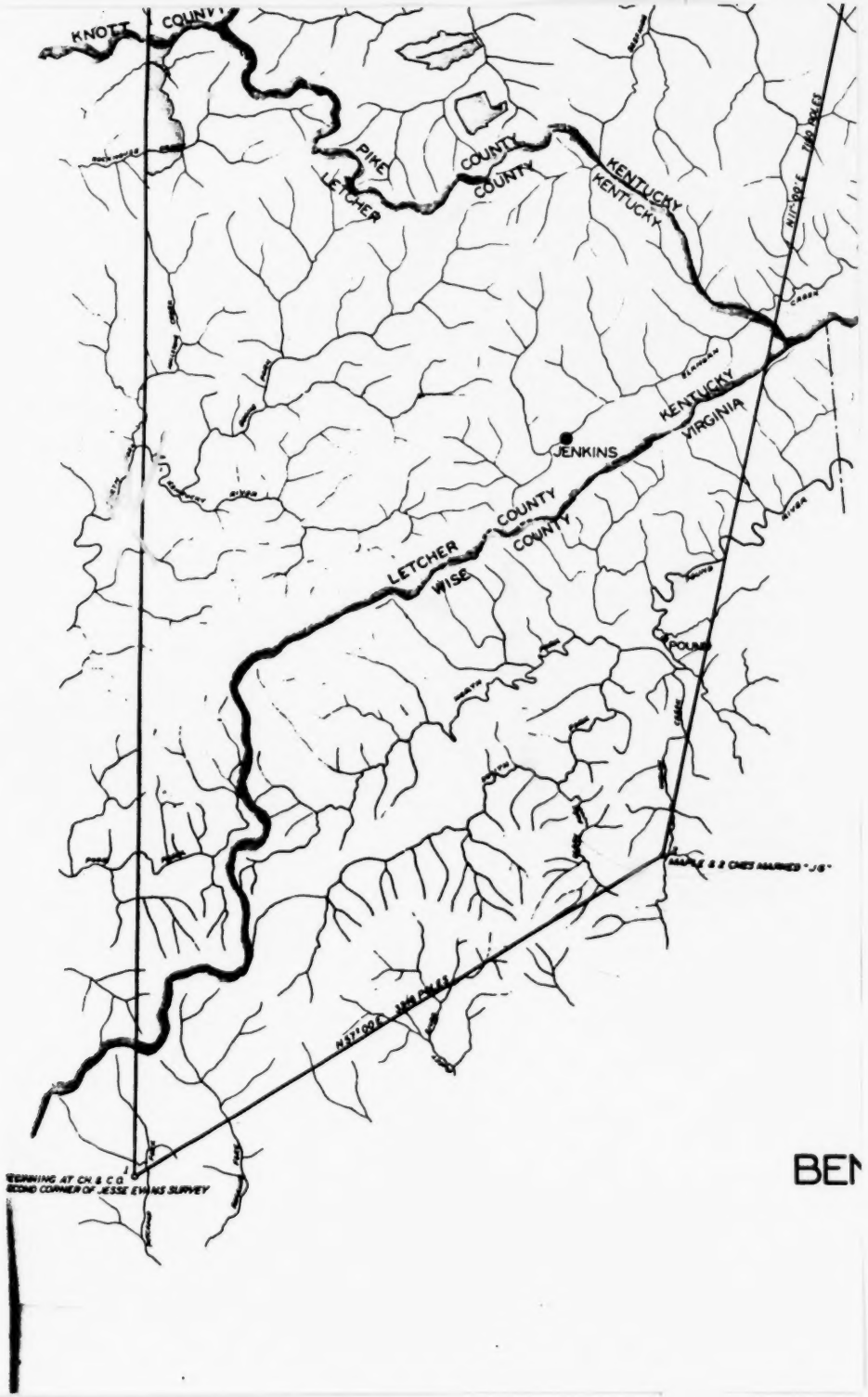
WARFIELD NATURAL GAS CO. PIPE LINES
ATLANTIC SEABOARD CORPORATION PIPE LINE



WARFIELD NATURAL GAS CO. LEASES
WARFIELD NATURAL GAS CO. PIPE LINES
ATLANTIC SEABOARD CORPORATION PIPE LINE

EXHIBIT "A"

MAP SHOWING

BENJAMIN HASKELL PATENT

SCALE

0 1 2 3 4 5 6

MILES

MAY 28, 1940

tions not herein specifically adjudged". See the closing paragraph of the judgment entry. R. 127 at page 129.

It is necessary then to know (1) what complete adjudication required, (2) what was done, and (3) what remains to be done. The statute required the forfeiture judgment to be recorded and indexed as deeds are recorded and indexed. It required proceedings for redemption and purchase back, or a sale of the land with accounting of funds realized and disbursement of the net proceeds. The petition for forfeiture prayed specifically for all these required proceedings. R. 36 at R. 52, folios 108 to 111.

Not one of these further proceedings was completed. R. 214, paragraphs 14 to 17. The case stopped with the partial judgment of forfeiture which ended with this paragraph:

> "All other questions not herein specifically adjudged are reserved for further adjudication to this judgment the Defendants Eastern Kentucky Coal Lands Corporation and C. B. Hillhouse object and except."

This subject of the incompletion of the forfeiture case has been discussed in the briefs in support of the petition for certiorari. However the attention of the court is here invited to the serious consequences of permitting a title to be forfeited against the whole world when there is no record of any transfer of title by forfeiture to be found in the record and index of deeds and the law controlling and prescribing the method of forfeiture specifically and mandatorily requires that the judgment "**shall be recorded in the deed book of the county** where the land or any part thereof lies **and indexed as deeds are required to be indexed.**" R. 246, paragraph 14.

It is pertinent to enquire whether it is becoming to sovereignty to protect a purchaser against an individual who failed to record his deed and yet refuse to protect a purchaser against the sovereignty which clearly and pointedly assured him that any judgment of forfeiture by it must be recorded and indexed as a deed. Such conduct puts the state into the shady business of solemnly assuring the world that its deed records and indexes may be relied upon to show all forfeitures and then asserting that its violation of its own statute is of no consequence. This is especially unbecoming when the state confesses that all its files of the case are lost "or can not be found" and it becomes necessary to go to Washington and dig up in the files of the Supreme Court the records of the Circuit Court of Pike County.

We think this aspect of the case should not be lightly brushed aside.

The Effect of This Court's Decision in 219 U. S. 140 on the Forfeiture Judgment.

The respondent in both courts below has again and again stressed the fact that the forfeiture judgment was "affirmed by the Supreme Court of the United States in 219 U. S. 140". Each of the courts below stressed the same assertion. In like manner as the geographical extent of the forfeiture judgment has without warrant been extended far beyond its limits, and similarly as the partial forfeiture judgment has been construed as complete compliance with the statutory prescriptions as prayed in the petition for forfeiture, or, what is the same thing, compliance has been held to be unnecessary, so the effect of the decision in 219 U. S. 140, has been enlarged far beyond its content.

That decision of this court adjudicated but one issue—was the state statute constitutional under which the forfeiture petition was invoked? No other question was considered; none other was before the court. The first sentence of the opinion limits its effect to "the constitutionality of an act of the legislature of the state, passed March 15, 1906, entitled 'An Act Relating to Revenue and Taxation' ". The petition for forfeiture is based upon this same "Act Relating to Revenue and Taxation' approved March 15, 1906." See the first sentence of the opinion in *Kentucky Union* v. *Kentucky* (*Eastern Ky. Coal Lands Corporations* v. *Commonwealth of Kentucky,* No. 48), 219 U. S. 140, at page 142. See also the prayer of the petition of the Commonwealth in the Pike Circuit Court, R. 36, at page 47, folio 100. At page 151 of the opinion it was pointedly declared that "This court is concerned only with the constitutionality of the law in view of the applicable provisions of the Federal Constitution."

This court in 219 U. S. 140, did not consider what, if any, lands had been comprised in the forfeiture judgment in Case No. 48 originating in Pike Circuit Court. It did not consider the effect of noncompliance with the portions of the statute yet to be adjudicated and administered under the continuance embodied in the last paragraph of the forfeiture judgment. R. 29. It merely held the statute to be constitutional. It did not hold that noncompliance with the statute was effective to forfeit title nor did it hold that the 300,000 acres of the Haskell grant were forfeited by the Pike Circuit Court judgment. See pages 7 to 10 of this petition for rehearing.

We think it is clearly demonstrated that there are yet serious issues as to the materia! fact of whether or not any lands lying outside of Pike County were affected by the forfeiture judgment, and of whether the judgment it-

self was effective. Therefore the first ground on which the courts below based the conclusion that no material issue of fact exists, namely that all the lands of the 300,000 acres were forfeited by judgment of the state court, is untenable.

We pass to an examination of the second ground asserted to support the conclusion that no material issue exists, namely that the petitioner is precluded by adverse possession from evicting the respondent from any of the lands in controversy.

2.

The Claim of Adverse Possession Examined.

The present ejectment suit of the petitioner encompasses the entire Haskell grant of 300,000 acres. The map of the Haskell grant at Record 136 shows that it lies in five counties of Kentucky and Virginia, that is in Pike, Floyd, Knott, and Letcher Counties, Kentucky, and Wise County, Virginia.

In the respondent's answer it asserts it owns real property rights in Pike, Floyd, and Knott Counties and incorporates as "Exhibit A" its "List of Leases" which indicate its claims. The "List of Leases" lists those in Floyd and Pike Counties only. See Answer R. 4 at R. 7, paragraph 15. "List of Leases" R. 12, 22 inserted pages. The respondent's Chief Engineer Cunningham made affidavit and included, as a different "Exhibit A" a map of the Haskell grant showing in yellow all real property rights occupied by the respondent through parties "claiming to own the said lands". This map shows such lands in Pike, Floyd, Knott, and Letcher Counties. R. 134 to 136. The

respondent's Division Superintendent Rowan made affidavit that the wells indicated in "Exhibit A" to the answer have been operated since the date of drilling there indicated, or since 1926 if drilled before then. R. 138.

Note: It is necessary to keep in mind that two very different documents are incorporated in the record by respondent as "Exhibit A". The "Exhibit A" in the Answer is the "List of Leases" at R. 12. The "Exhibit A" in the Cunningham affidavit is the Haskell grant map of R. 136.

In its motion for summary judgment the respondent claims adverse possession against the petitioner as to all the lands which it occupies within the 300,000 acres in the Haskell grant. R. 25 at R. 26, paragraphs 2 and 3. In support of its motion the respondent filed a large number of "Affidavits as to Possession", R. 140 to 218, which we will notice later. It also filed an affidavit by Assessor Sturgill relating to absence of assessment records in the names of the petitioner and certain of its mesne grantors since 1917. R. 219.

The petitioner filed its counter motions and answer on facts denying generally, and also categorically and specifically, the allegations and assertions made by and on the part of the respondent. R. 223 to 231. R. 229, folio 221. R. 230, folio 22. R. 224, folio 225 and 226. R. 242 to 253. R. 254 to 261. R. 257, last paragraph at foot of the page, continuing to R. 261.

In order to appraise the effect of these "pleadings, depositions and admissions on file, together with the affidavits" (quoting from Rule 56(c)) as they relate to the claim of adverse possession against the petitioner in favor of the respondent, it is necessary to examine them. It is also necessary to know something of the standard of proof required.

Rule 56 (c) prescribes that:

> "Supporting and opposing affidavits shall be made on **personal knowledge, shall set forth such fact as would be admitted in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.**"

The Pleadings, Motions and Affidavits Examined.

The Answer of the respondent in its Third Defense, R. 4, paragraph 14, and R. 7, paragraph 15, and also in its Eighth Defense at R. 11, paragraph 25, claims real property rights in designated portions of the lands sued for by the petitioner lying in "Pike, Floyd, and Knott Counties, in Kentucky" which it averred were indicated in its "Exhibit A," "List of Leases." That "Exhibit A," "List of Leases" is at R. 12. In its Cunningham Affidavit at R. 134 and 135, it inserted another "Exhibit A" which is entitled "Map showing Benjamin Haskell Patent". That "Exhibit A," Map of Haskell Grant, is at R. 136. This Cunningham affidavit states that the areas colored yellow on the map "is the territory held by the defendant" [respondent here] under leases from "parties claiming to own" the lands.

One Square Mile of Land in Issue.

Now the respondent's map, Exhibit A at R. 136, shows the respondent occupying a tract in Letcher County, Kentucky, which by the scale of the map (see legend at bottom of map), is over two miles long and from a quarter to a half mile wide, approximately one square mile of land. The respondent asserts that it occupies this land under claim of right against the petitioner, but it has not submitted an iota of evidence or claim showing any right whatsoever to hold this land against the petitioner.

The petition seeks to eject the respondent from this tract of one square mile of land as a part of the 300,000 acres in the Haskell grant. **Here is a grave issue of fact between the petitioner and the respondent.**

Three-eighths of a Square Mile of Land In Issue.

The respondent's map, Exhibit A at R. 136, also shows the respondent occupying an irregular tract in Knott County, Kentucky, which is roughly ½ by ¾ of a mile or 240 acres, that is three-eighths of a section of land.

Respondent's Exhibit A in its Answer, being the "List of Leases", does not mention any lands whatsoever in Knott County.

One of the numerous affidavits submitted by the respondent to support its motion for summary judgment is that of Marion Hall at R. 184. He limits his affidavit to the lands in the respondent's Exhibit A, as a part of its answer which exhibit does not list Knott County. He states at the top of R. 185:

> "The lands particularly described and about which he has personal knowledge in the answer in Exhibit 157 'A' being described by lease number and the lessor are as follows:"

At the bottom of R. 186 he includes "Lease No. 27282 located in Knott County" and says the title came from the heirs of James Hall and that Bill Hall once owned the entire tract of 480 acres; no description or location is given. This Marion Hall affidavit does not in any manner meet the requirements of Rule 56(c) that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admitted in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Now in the respondent's affidavit of George W. Meade at R. 193, which also is limited to the List of Leases in the Exhibit A in the respondent's answer, he also lists Lease No. 27282. He states at R. 193, folio 170:

> "The tracts more particularly described being marked on 'Exhibit A' of the defendant's answer herein, which he has examined and consists of Lease No. 27282, leased to the Warfield Natural Gas Company by Tipton Hall and Mary Jane Hall of Amba, Kentucky, that the present owners of surface are Wilburn Hall, et al. and the lessors received their title from Rebecca Sturgill, et al., and this tract consists of approximately 33.20 acres."

At page 4 of Exhibit A "List of Leases" we find the lease 27282 listed in Floyd County, lessors Tipton and Mary Jane Hall, new owners, Wilburn, Joe, Bill and Buster Hall, Grantors, various Sturgills, Haynes, a Harkness, a McKinney, and John, Elonder and Andrew Hall. Acreage 33.20. There can be no confusion of lands by reason of contiguity because respondent's Exhibit A, Map of the Has-

kell Grant, designating lands held by the respondent, shows the Knott County tract a mile and a half distant from any other land held by the respondent.

Here also is a grave issue of fact between the petitioner and the respondent.

Boiled down to its essence the situation as to these two tracts of approximately one and a half square miles is this:

The petitioner sued the respondent for ejectment from this one and and one-half square mile area as a part of the 300,000 acre Haskell grant and the respondent moved for a summary judgment showing that it occupies the land. The issue remains and Rule 56 does not authorize a summary judgment.

No Other Land Is Eliminated as an Issue.

The respondent has failed to identify with particularity a single tract which it claims to hold adversely. The only places where it has referred to lands claimed to be held by adverse possession are (1) its answer, R. 4, at R. 7, paragraph 15, and R. 11, paragraph 25; (2) its Exhibit A "List of Leases", R. 12; (3) its motion for summary judgment, R. 25 at page 25, paragraphs 2 and 3 and (4) the various "Affidavits as to Possession", R. 140.

It is utterly impossible to locate any land referred to in any of the respondent's "Affidavits as to Possession" which are the "Defendant's Exhibits 9 to 27" put into the record at R. 140 to 218, or included in its "List of Leases" consisting of the 22 pages inserted at R. 12. Not a single one of the tracts included in the affidavits or in the list of leases can be pointed out either on the ground or on the map.

When tested by the requirements of Rule 56(c) that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admitted in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

these attempts at eradicating any issue of fact fail to accomplish the intended result. Under the requirement that the affidavit shall "set forth such facts as would be admitted in evidence" let any item of the list of leases or any item of any affidavit be tested. All that the list of leases does is to name a county, give a lease number, its date, place of record, names and addresses of lessors, names and addresses of new owners with date of change, acreage, the serial number and date of any well drilled, name and address of the lessor's grantor with date of conveyance with date, book and page of record. All that the affidavits do is to give a lease number, name of lessor and lessee, acreage sometimes, with a statement that the affiant knows the land or some one in a claimed chain of title.

In short there is no fact given from which it is possible to take the only evidence submitted by the respondent as to the tracts it occupies, that is the map of the Haskell grant at R. 136 where it has colored in yellow the tracts it occupies, and check off the tracts one by one until it is demonstrated that the respondent even claims to have any right to all it admits that it occupies. It is to be remembered that the map of the Haskell grant, at R. 136, is no claim whatever to adverse possession. It is nothing but an admission that it **occupies** certain tracts—not that it claims any right of occupancy. The Cunningham affidavit of which it is a part limits its effect strictly to "territory **held** by the defendant". R. 135, end of affidavit.

The respondent has wholly failed to show any claim of right to adverse possession to all of the lands from which the petition seeks its eviction.

In this respect there is a grave issue as to material facts.

CONCLUSION.

Beyond all doubt "the pleadings, depositions and admissions on file, together with the affidavits" show that a "genuine issue" exists as to the claimed fact of forfeiture of the lands in Floyd, Knott and Letcher counties. (The quoted words are from Rule 56(c).) Likewise there exists a "genuine issue" as to the claimed fact of adverse possession by the respondent of all the lands admitted to be occupied by the respondent within the area from which the petition seeks its eviction.

The existence of these issues being demonstrated, they being the only issues considered by either of the courts below, it follows that the judgments below were not authorized by Rule 56 of the Rules of Civil Procedure and they are contrary to the laws of the United States and in conflict with decisions as set up in the petition and brief for a writ of certiorari. Therefore certiorari should be granted.

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Lima, Ohio
February 14, 1944.

Certificate of Counsel.

I certify that the foregoing petition for rehearing is filed in good faith and not for any purpose of delay.

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Counsel for Petitioner.

Lima, Ohio
February 14, 1944.